

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**
10

11 THERESA BROOKE,) Case No.: 1:20-cv-0105 -NONE JLT
12 Plaintiff,)
13 v.) FINDINGS AND RECOMMENDATIONS
14 BRE SELECT HOTELS PROPERTIES LLC,) DISMISSING THE ACTION WITHOUT
15 Defendant.) PREJUDICE FOR PLAINTIFF'S FAILURE TO
16) COMPLY WITH THE COURT'S ORDERS AND
17) FAILURE TO PROSECUTE
18)
19)
20)
21)
22)
23)
24)
25)
26)
27)
28)

Theresa Brook asserts Bre Select Hotels Properties LLC, doing business as Hilton Garden Inn Bakersfield, is liable for violations of the Americans with Disabilities Act and California's Unruh Civil Rights Act. (Doc. 1) Because Plaintiff failed to prosecute this action and failed to comply with the Court's orders, it is recommended the action be **DISMISSED** without prejudice.

I. Relevant Background

Plaintiff initiated this action by filing a complaint on January 21, 2020. (Doc. 1) The same date, the Court issued a summons to Defendant and its New Case Documents. (Docs. 2, 3) In the order setting the mandatory scheduling conference for April 15, 2020, Plaintiff was informed:

The Court is unable to conduct a scheduling conference until defendants have been served with the summons and complaint. Accordingly, plaintiff(s) shall diligently pursue service of summons and complaint and dismiss those defendants against whom plaintiff(s) will not pursue claims. Plaintiff(s) shall promptly file proofs of service of the summons and complaint so the Court has a record of service. Counsel are referred to F.R.Civ.P., Rule 4 regarding the requirement of timely service of the complaint Failure to timely serve the summons and complaint may result in the imposition of sanctions, including the dismissal of unserved defendants.

1 (Doc. 3 at 1) Nevertheless, Plaintiff failed to file a proof of service.

2 On March 26, 2020, the Court issued an order to Plaintiff to “show cause why sanctions, up to
3 and including dismissal should not be imposed for the failure to prosecute this action and failure to
4 comply with the Court’s orders.” (Doc. 5 at 1-2) Plaintiff was informed that she could also file a proof
5 of service in the alternative. (*Id.* at 2) Although any response was due no later than April 3, 2020 (*id.*),
6 Plaintiff has not responded to the Court’s order or taken any other action to prosecute her claims.

7 **II. Failure to Prosecute and Obey the Court’s Orders**

8 The Local Rules, corresponding with Fed. R. Civ. P. 11, provide: “Failure of counsel or of a
9 party to comply with . . . any order of the Court may be grounds for the imposition by the Court of any
10 and all sanctions . . . within the inherent power of the Court.” LR 110. “District courts have inherent
11 power to control their dockets,” and in exercising that power, a court may impose sanctions including
12 dismissal of an action. *Thompson v. Housing Authority of Los Angeles*, 782 F.2d 829, 831 (9th Cir.
13 1986). A court may dismiss an action for a party’s failure to prosecute an action or failure to obey a
14 court order. *See, e.g. Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (dismissal for failure
15 to comply with an order to file an amended complaint); *Malone v. U.S. Postal Service*, 833 F.2d 128,
16 130 (9th Cir. 1987) (dismissal for failure to comply with a court order); *Henderson v. Duncan*, 779
17 F.2d 1421, 1424 (9th Cir. 1986) (dismissal for failure to prosecute and to comply with local rules).

18 **III. Discussion and Analysis**

19 To determine whether to dismiss an action for failure to prosecute and failure to obey a Court
20 order, the Court must consider several factors, including: “(1) the public’s interest in expeditious
21 resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to the
22 defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability
23 of less drastic sanctions.” *Henderson*, 779 F.2d at 1423-24; *see also Ferdik*, 963 F.2d at 1260-61;
24 *Thomson*, 782 F.2d at 831.

25 **A. Public interest and the Court’s docket**

26 In the case at hand, the public’s interest in expeditiously resolving this litigation and the Court’s
27 interest in managing the docket weigh in favor of dismissal. *See Yourish v. Cal. Amplifier*, 191 F.3d
28 983, 990 (9th Cir. 1999) (“The public’s interest in expeditious resolution of litigation always favors

1 dismissal”); *Ferdik*, 963 F.2d at 1261 (recognizing that district courts have inherent interest in
2 managing their dockets without being subject to noncompliant litigants). This Court cannot, and will
3 not hold, this case in abeyance based upon Plaintiff’s failure to comply with the Court’s orders and
4 failure to take action to continue prosecution in a timely manner. *See Morris v. Morgan Stanley & Co.*,
5 942 F.2d 648, 652 (9th Cir. 1991) (a plaintiff has the burden “to move toward... disposition at a
6 reasonable pace, and to refrain from dilatory and evasive tactics”). Accordingly, these factors weigh in
7 favor of dismissal of the action.

8 **B. Prejudice to Defendant**

9 To determine whether the defendant suffers prejudice, the Court must “examine whether the
10 plaintiff’s actions impair the ... ability to go to trial or threaten to interfere with the rightful decision of
11 the case.” *Malone*, 833 F.2d at 131 (citing *Rubin v. Belo Broadcasting Corp.*, 769 F.2d 611, 618 (9th
12 Cir. 1985)). Significantly, a presumption of prejudiced arises when a plaintiff unreasonably delays the
13 prosecution of an action. *See Anderson v. Air West*, 542 F.2d 522, 524 (9th Cir. 1976). Here, Plaintiff
14 has not taken any action to further her prosecution of the action, despite being ordered by the Court to
15 do so. Therefore, this factor weighs in favor of dismissal.

16 **C. Consideration of less drastic sanctions**

17 The Court “abuses its discretion if it imposes a sanction of dismissal without first considering
18 the impact of the sanction and the adequacy of less drastic sanctions.” *United States v. Nat’l Medical*
19 *Enterprises, Inc.*, 792 F.2d 906, 912 (9th Cir. 1986). However, a court’s warning to a party that the
20 failure to obey could result in dismissal satisfies the “consideration of alternatives” requirement. *See*
21 *Malone*, 833 F.2d at 133; *Ferdik*, 963 F.2d at 1262. As the Ninth Circuit explained, “a plaintiff can
22 hardly be surprised” by a sanction of dismissal “in response to willful violation of a pretrial order.”
23 *Malone*, 833 F.2d at 133.

24 The Court warned Plaintiff in the order setting the scheduling conference that “[f]ailure to
25 timely serve the summons and complaint may result in the imposition of sanctions, including the
26 dismissal of unserved defendants.” (Doc. 3 at 1) As a result, Plaintiff was ordered to show cause why
27 terminating sanctions should not be imposed. (Doc. 5 at 2) Importantly, the Court need only warn a
28 party once that the matter could be dismissed for failure to comply to satisfy the requirements of Rule

1 41. *Ferdik*, 963 F.2d at 1262; *see also Titus v. Mercedes Benz of North America*, 695 F.2d 746, 749 n.6
2 (3rd Cir. 1982) (identifying a “warning” as an alternative sanction). Accordingly, the warning to
3 Plaintiff satisfied the requirement that the Court consider lesser sanctions, and this factor weighs in
4 favor of dismissal of the action. *See Ferdik*, 963 F.2d at 1262; *Henderson*, 779 F.2d at 1424; *Titus*, 695
5 F.2d at 749 n.6.

6 **D. Public policy**

7 Given Plaintiff’s failure to prosecute the action and failure to comply with the Court’s order,
8 the policy favoring disposition of cases on their merits is outweighed by the factors in favor of
9 dismissal. *See Malone*, 833 F.2d at 133, n.2 (explaining that although “the public policy favoring
10 disposition of cases on their merits . . . weighs against dismissal, it is not sufficient to outweigh the
11 other four factors”).

12 **IV. Findings and Recommendations**

13 Plaintiff failed to comply with the Court’s orders dated January 21, 2020 (Doc. 3) and March
14 26, 2020 (Doc. 5), and thereby failed to prosecute this action. According, the Court **RECOMMENDS**:

- 15 1. This action be **DISMISSED** without prejudice; and
16 2. The Clerk of Court be **DIRECTED** to close the action.

17 These Findings and Recommendations are submitted to the United States District Judge
18 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule 304 of the Local
19 Rules of Practice for the United States District Court, Eastern District of California. Within fourteen
20 days after being served with these Findings and Recommendations, Plaintiff may file written
21 objections. Such a document should be captioned “Objections to Magistrate Judge’s Findings and
22 Recommendations.” Plaintiff is advised that failure to file objections within the specified time may
23 waive the right to appeal the District Court’s order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991);
24 *Wilkerson v. Wheeler*, 772 F.3d 834, 834 (9th Cir. 2014).

25
26 IT IS SO ORDERED.

27 Dated: April 6, 2020

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE